Supreme Court, U.S.
FILED
SEP 30 1992
OFFICE OF THE CLERK

No. 92-244

In The

Supreme Court of the United States

October Term, 1992

PETER R. PIEKARSKI,

Petitioner,

vs.

HOME OWNERS SAVINGS BANK, F.S.B. and M. GENE DONLEY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WILLIAM P. LUTHER
4624 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 338-1931

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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The following issues were first raised in the briefs in opposition to the petition for certiorari. Therefore, petitioner responds to the arguments first raised in those briefs pursuant to this Court's Rule 15.6.

I. Whether Petitioner's Challenges to the Lower Court Exercise of Jurisdiction Over His State Law Claims (Questions I and II) are Properly Before This Court.

The Justice Department contends that since the arguments made in Questions I and II of the petition were not

made at the court of appeals level they "are not properly before the Court." Brief for the Federal Respondent in Opposition at 6. That argument misunderstands the underlying bases for the challenges and the authority cited for its own proposition.

The federal courts are of limited jurisdiction. *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 29 S.Ct. 458, 463 (1909); *National Surety Corp. v. Chamberlain*, 171 F.Supp. 591, 592 (N.D. Tex. 1959) (federal courts presumed to be without jurisdiction unless Federal Constitution or act of Congress pursuant to constitutional authority provides otherwise). If the federal court exercise of jurisdiction over petitioner's state law claims was unconstitutional or otherwise improvident, the federal courts were without authority to reverse petitioner's state court liability victory. *Murray, supra.* This Court has noted that the independence of the state governments requires that federal courts scrupulously confine their own jurisdiction. *Healy v. Ratta*, 292 U.S. 263, 54 S.Ct. 700, 703 (1934). Petitioner cannot confer jurisdiction on the federal courts by arguing to uphold his trial court victory at the court of appeals level.

The authority cited by the Justice Department for the preclusive effect of a failure to raise an argument at the court of appeals level, in addition to being inapplicable to jurisdictional issues, speaks predominantly to arguments not set forth in the petition and is discretionary, not preclusive. *See Demarest v. Manspeaker*, 111 S.Ct. 599, 602-03 (1991) (citing *Lytle v. Household Mfg., Inc.*, 110 S.Ct. 1331, 1336, n. 3 (1990)). "Only the questions set forth in the petition, or fairly included therein, will be considered

by the Court." This Court's Rule 14.1(a). All of the petitioner's arguments are properly set forth in his petition, and while "the benefit of a full record or lower court determination" . . . effects this "Court's discretion," *Lytle, supra,* the procedural posture of this case and the compelling arguments set forth by petitioner more than compensate for that consideration.[1]

II. Whether *Smith v. Barry,* 112 S.Ct. 678 (1992), Controls Question III of the Petition.

Question III of the petition inquires whether collateral papers *filed at the same time as an actual notice of appeal* may serve as the functional equivalent of the notice of appeal. (Emphasis added.) In *Barry,* this Court granted certiorari to decide "whether an appellate brief may serve as the notice of appeal required by Rule 3." 112 S.Ct. at 681. This Court held that "a document intended to serve as an appellate brief may qualify as the notice of appeal required by Rule 3." *Id.* at 680. In reaching that conclusion, this Court noted that the Federal Rules "envision that the notice of appeal and the appellant's brief will be *two separate filings,*" and "do not preclude an appellate court from *treating a filing styled as a brief as a notice of appeal.*" *Id.* at 682 (emphasis added). In contrast to *Barry,* the document that the court of appeals treated as individual defendant Donley's notice of appeal was accompanied by an actual notice of appeal which was defective

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[1] The Justice Department references the amendment to 12 U.S.C. §1441a(1)(3) (designed to avoid the hardship suffered by petitioner) as a mitigating factor. Brief for the Federal Respondent at 6. Instead, that fact should heighten the inquiry.

as to Donley. Therefore, the logic behind "treating" a collateral document as a notice of appeal is that it can be seen as a separate invocation of the court's jurisdiction. That rationale is simply inapplicable when an actual notice of appeal is part of the same filing. *See* Petition for Writ of Certiorari at 60-62.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

WILLIAM P. LUTHER
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80 South Eighth Street
Minneapolis, MN 55402
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Attorney for Petitioner